

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 276 of 1997****For Approval and Signature:**

HON'BLE MR.JUSTICE J.M.PANCHAL
AND
HON'BLE MR.JUSTICE H.B.ANTANI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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STATE OF GUJARAT - Appellant
Versus
PATANI HUSAIN @ DADA ABDEMAN - Respondent

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Appearance :
MS HANSA PUNANI, APP for Appellant.
NOTICE SERVED for Respondent.

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE H.B.ANTANI

Date : 22/07/2005**ORAL JUDGMENT****(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)**

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973 ("the Code" for short) is directed

against judgment dated January 31, 1997 rendered by the learned Additional Sessions Judge, Junagadh, in Sessions Case No.6 of 1995 by which the respondent is acquitted of the offence punishable under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 ("the Act" for short).

2. The facts emerging from the record of the case are as under:

On October 5, 1994, Mr.D.R.Agrawat was discharging duties as Police Sub Inspector of Veraval City Police Station. He received an information that a person wearing cream coloured pant and shirt having black dots was to alight at Veraval Bus Station with a plastic bag containing *charas*. On receipt of the information, Mr.Agrawat reduced the same into writing and made Entry No.4/94 in the Station Diary maintained at City Police Station. He thereafter informed his immediate superior official Mr.Buch, who was then Police Inspector of the Police Station. It was decided to arrange a raid and, therefore, services of two panch witnesses were requisitioned. The raiding party including the panch witnesses went to Veraval Bus Station and maintained a watch over there. The person whose description was given in the secret information was spotted at about 9.00 a.m.. He was stopped by the members of the raiding party. Mr.Agrawat introduced himself to the said person and informed him that an information was

received that he was carrying *charas* in plastic bag and, therefore, it was necessary to search the bag. On interrogation, the person who was to be searched disclosed his name to be Patani Husain @ Dada Abdeman, i.e. the respondent. PSI Mr.Agrawat offered the respondent to be searched in presence of a gazetted officer or a magistrate, but the said offer was declined by the respondent. Thereupon, the plastic bag carried by the respondent was searched. It was found that it was containing *charas*. It was necessary to weigh the substance found from the plastic bag carried by the respondent. Therefore, one Head Constable was asked to requisition services of a person to weigh the substance. Accordingly, Soni Nitinkumar Amrutlal with scales and weights was brought by the Head Constable. He weighed the substance seized from the possession of the respondent. The weight of the substance was found to be 1432 gms.. Out of the said substance, two samples each of 25 gms. were prepared and sealed. Each sample was placed in a plastic jar whereas rest of the quantity of *charas* was placed in a third plastic jar. A detailed panchnama indicating search of the respondent and seizure of *charas* from his possession was prepared. PSI Mr.Agrawat lodged his complaint at Veraval City Police Station. He also handed over the samples prepared as well as panchnama and the respondent to Police Constable Mr.Prachhak of Veraval City Police Station, who kept the samples in safe custody. One of the samples was forwarded to Forensic Science Laboratory for

analysis through Police Constable Mr.Sonrat. The report of the analysis indicated that the substance recovered from the possession of the respondent was to be *charas* within the meaning of the provisions of the Act. On completion of investigation, the respondent was chargesheeted in the Court of learned Judicial Magistrate First Class, Veraval, for commission of offence punishable under Section 22 of the Act.

3. As offence punishable under Section 22 of the Act is exclusively triable by a Special Judge, the case was committed to the Court of learned Special Judge, District Junagadh. The learned Additional Sessions Judge, Junagadh, to whom the case was made over for trial framed necessary charge against the respondent at Exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Panch witness Shantilal Kakubhai Solanki as P.W.-1 at Exh.6; (2) Chandulal Maganlal Lodhiya as P.W.-2 at Exh.11; (3) Bhagwanjibhai Parsottambhai Madhak as P.W.-3 at Exh.12; (4) Mohitkumar Subhashchandra Prachhak as P.W.-4 at Exh.15; (5) Ramjibhai Dhanabhai as P.W.-5 at Exh.16; (6) Nitinkumar Amrutlal Shah as P.W.-6 at Exh.17; (7) Chatrabhuji Keshavbhai as P.W.-7 at Exh.21; (8) Dhananjay Rajnikant Buch as P.W.-8 at Exh.22; and, (9) Dilipkumar Rameshchandra Agrawat as P.W.-9 at Exh.25, to prove its case against the respondent. The prosecution also produced documentary evidence such as panchnama indicating search of

plastic bag carried by the respondent and seizure of *charas* therefrom at Exh.7; memorandum indicating that out of quantity of *charas* seized, two samples each of 25 gms. were prepared at Exh.8; memorandum indicating that price of *charas* seized was estimated to be Rs.50,000=00 at Exh.9; complaint lodged by PSI Mr.Agrawat at Exh.13; necessary extract from Station Diary at Exh.14; receipt issued by Nitinkumar Soni indicating that two samples of 25 gms. each were drawn from the quantity of *charas* seized from the possession of the respondent and were properly sealed at Exh.19; intimation given by PI, Veraval, to D.S.P., Junagadh, that the respondent was arrested with reference to commission of offence punishable under the Act at Exh.23; forwarding letter with which *muddamal* was sent to Forensic Science Laboratory for analysis at Exh.24; memorandum indicating that secret information received by Mr.Agrawat was reduced into writing at Exh.26; extract from the Station Diary at Exh.27; memorandum prepared by Mr.Agrawat indicating compliance of Section 50 of the Act at Exh.28; grounds of arrest communicated to the respondent at Exh.29; another copy of the complaint lodged by Mr.Agrawat at Exh.30; report of chemical examination of *muddamal* at Exh.34, report of biological examination of *muddamal* at Exh.35; report sent by PSI, Veraval, to PS0, Veraval City Police Station, to register offence against the respondent under the Act at Exh.36; affidavit of Mr.Agrawat at Exh.37, etc. in support of its case against the respondent.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the respondent the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, the case of the respondent was that of total denial. No defence evidence was led by him.

5. On appreciation of evidence adduced by the prosecution, the learned Judge of the trial Court held that neither in the panchnama, Exh.7, nor in the complaint, Exh.30, reference about memorandum indicating compliance of Section 50 of the Act produced at Exh.26 is made and, therefore, it was not proved by the prosecution that Mr.Agrawat had offered the respondent to be searched in presence of a gazetted officer or a magistrate as required by Section 50 of the Act. The learned Judge further noticed that though panch witness Shantilal had supported the prosecution, the said witness had not referred to offer made by Mr.Agrawat in his examination-in-chief, but had made reference to the same in his cross-examination whereas Police Constable Chatrabhuj, who was one of the members of the raiding party had also not referred to the contents of Exh.28 indicating compliance of Section 50 of the Act and, therefore, the case of the prosecution that Section 50 of the Act was complied with, was doubtful. According to the learned Judge of

the trial Court, panch Shantilal in his testimony recorded at Exh.6 stated that after dividing the *muddamal* into three parts, each part was packed and sealed with seal bearing impression "*Veraval City Police Station, Veraval*" whereas PI Mr.Dhananjay Buch in his testimony recorded at Exh.22 stated that on *muddamal* seal of "*Police Station Officer, City Veraval*" was applied while PSI Mr.Agrawat stated that seal of "*Police Station, Veraval City*" was applied on *muddamal* and as there was discrepancy in the testimony of witnesses regarding seal applied on *muddamal*, it would be difficult to conclude that *muddamal* was properly sealed as required by law. On the question of seal, the learned Judge further held that the report of the Forensic Science Laboratory was of little consequence and was of no avail to the prosecution. The learned Judge noticed that no report as required by Section 102(3) of the Code was made by the Officer, who had arranged the raid and non-compliance of the said provisions was fatal to the prosecution. The learned Judge also noticed that panch witness Shantilal had also acted as a panch in two other cases and, therefore, his testimony was not reliable. The learned Judge further noticed that *muddamal* was handed over by PSI Mr.Agrawat to Police Constable Mr.Mohitbhai only in the evening at about 4.00 p.m. though it was seized earlier and held that discrepancy about the seals applied on the *muddamal*, if taken into consideration with the fact that *muddamal* was retained by PSI Mr.Agrawat with him for unreasonable time and

was handed over to Police Constable Mr.Mohitbhai in the evening at 4.00 p.m., does not rule out possibility of tampering with *muddamal*. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent by judgment dated January 31, 1997 giving rise to instant appeal.

6. Ms.Hansa Punani, the learned Additional Public Prosecutor for the State, contended that what was searched was plastic bag carried by the respondent but not his person and, therefore, the provisions of Section 50 of the Act were not applicable to the facts of the case in view of decision in **State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350**. The learned counsel also argued that no information was received by Mr.Agrawat that the respondent had committed an offence punishable under the Act or kept any document or other thing indicating commission of offence punishable under the Act in any building, conveyance or an enclosed place and, therefore, the provisions of Section 42 of the Act were also not applicable to the facts of the case. It was maintained before the Court that it is neither requirement of law nor it is customary to state evidence either in the complaint or in the panchnama and, therefore, even if the Court comes to conclusion that the provisions of Section 50 of the Act were attracted to the facts of the case, the finding recorded by the learned Judge of the trial Court that provisions of said section were not complied with should be set aside more particularly in view

of the assertion made by PSI Mr.Agrawat on oath that he had complied with the provisions of Section 50 of the Act and the contents of the memorandum produced by the prosecution at Exh.28. What was asserted was that the seal used in the case was round-seal bearing impressions of "*Police Station Officer City*" wherein in the middle word "*Veraval*" was mentioned, and as the learned Judge of the trial Court has ignored this vital feature of the seal, the finding recorded by him regarding so-called discrepancy with reference to seal used on *muddamal* deserves to be set aside. According to the learned Additional Public Prosecutor, immediately after filing of complaint, report as contemplated by Section 157 of the Code was forwarded to the learned Magistrate immediately which should have been construed as report under Section 102(3) of the Code and the learned Judge was not justified in acquitting the respondent on the ground that provisions of Section 102(3) of the Code were not complied with. The learned counsel of the State Government pleaded that the learned Judge of the trial Court has not only misconstrued the evidence on record, but has also misconstrued statutory provisions of the Act and, therefore, the appeal should be allowed.

7. Though duly served, the respondent has neither appeared in person nor through his lawyer.

8. This Court has heard Ms.Hansa Punani, the learned

Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. From the record of the case, it is evident that PSI Mr. Agrawat received an information that a person carrying plastic bag containing *charas* was to alight at Veraval Bus Station. Pursuant to abovereferredto information, a raid was arranged. As the respondent was answering the description of the person given in the information, he was spotted and the plastic bag carried by him was searched. The record nowhere shows that body of the respondent was searched. In **State of H.P. (supra)**, the Supreme Court has authoritatively held that a bag, brief case, or any other article or container etc. can under no circumstances be treated as body of a human being. The Supreme Court has explained that they are given a separate name and are identifiable as such and they cannot even remotely be treated to be part of the body of a human being. What is laid down for the guidance of the Courts in country is that depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight, however, while carrying or moving along with them, some extra effort or energy would be

required and they would have to be carried either by the hand or hung on the shoulder or back or placed on the head and in common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. as a result of which, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

10. In view of the decision of the Supreme Court quoted above, this Court is of the firm opinion that provisions of Section 50 of the Act were not applicable to the facts of the case. The learned Judge of the trial Court was, therefore, not justified in acquitting the respondent on the ground that mandatory provisions of Section 50 of the Act were not complied with by Mr.Agrawat. Even if it is assumed for the sake of argument that the provisions of Section 50 of the Act were attracted to the facts of the case, this Court finds that provisions of Section 50 were fully complied with. Mr.Agrawat has specifically and assertively stated in his testimony that he had offered the respondent to be searched in presence of a gazetted officer or a magistrate, but the offer was declined by the respondent. Though Mr.Agrawat was cross-examined in detail, nothing could be brought on record, which would create doubt about his assertion that he had made offer to the respondent as required by Section 50 of the Act. Further, Mr.Agrawat stands completely corroborated by contemporary

document namely, memorandum indicating compliance of section 50 of the Act, which is produced by the prosecution at Exh.28. In Exh.28, it is clearly stated that Mr.Agrawat had offered the respondent to be searched in presence of a gazetted officer or a magistrate and that he had declined the offer. Though panch witness Shantilal missed to state the fact that offer as required by Section 50 of the Act was made by Mr.Agrawat in his examination-in-chief, that fact was brought on record by defence during his cross-examination. In his cross-examination, the panch witness has clearly stated that Mr.Agrawat had offered the respondent to be searched in presence of a gazetted officer or a magistrate. The reasoning given by the learned Judge for coming to the conclusion that the provisions of Section 50 of the Act were not complied with because the said fact was not mentioned either in the panchnama or in the complaint, is absurd and contrary to well-established principle of appreciation of evidence. A complaint need not contain all minor details nor evidence to be adduced by the prosecution at trial. The complaint normally should contain the facts which disclose commission of offence so that on the basis of the averments made therein, criminal law is put into motion. First Information Report is not an indispensable requisite for investigation of crime. Investigation can be started even without that. First Information Report as such is not a substantive piece of evidence and can be used for the purpose of corroborating or contradicting the maker of it. As

First Information Report is not expected to contain all the minute details, absence of reference to the offer made by Mr.Agrawat under Section 50 of the Act could not have persuaded the learned Judge of the trial Court to come to the conclusion that the provisions of Section 50 of the Act were not complied with. Whether provisions of Section 50 of the Act were complied with or not should have been decided by the learned Judge of the trial Court with reference to substantive evidence led on oath before him. Similarly, panchnama in a case of find of narcotic drug or psychotropic substance is prepared to indicate as to how the search was made, what was found and how the samples drawn were packed and sealed. The law does not require that compliance of Section 50 of the Act must be reflected in the panchnama also. Under the circumstances, the finding recorded by the learned Judge of the trial Court that the mandatory provisions of Section 50 of the Act were not complied with is liable to be set aside more particularly when the assertion made by Mr.Agrawat that he had complied with those provisions could not be dislodged. Therefore, the said finding is hereby set aside.

11. Similarly, the finding that there is discrepancy in evidence of prosecution witnesses regarding use of seal and, therefore, the respondent is entitled to acquittal, is also erroneous and liable to be set aside. This Court finds that while dealing with the question of seal applied on *muddamal*,

the learned Judge has totally ignored the most material fact mentioned in the panchnama itself that round-seal having impression "*Police Station Officer, City*" with word "*Veraval*" in the middle was used while packing the sample. The so-called discrepancy about the description of seal in the evidence of three witnesses could have hardly been regarded as vitiating sealing procedure adopted by PSI Mr.Agrawat. PSI Mr.Agrawat has specifically in his testimony stated that the seal bearing impression "*Police Station, Veraval City*" was used. The record further shows that specimen seal was sent to Forensic Science Laboratory to enable it to compare the same with the seal applied on the *muddamal*. If the learned Judge of the trial Court had taken care to see the specimen seal produced on record of the case, probably the finding that there is inconsistency in evidence regarding the seal applied on *muddamal* would not have been arrived at by him. On the facts and in the circumstances of the case, this Court is of the opinion that there is no discrepancy in the use of seal at all and the respondent could not have been acquitted on the ground that discrepancy about description of seal used did not rule out possibility of tampering with the *muddamal*.

12. No information was received by Mr.Agrawat that an offence punishable under the Act was committed or any document indicating commission of such offence was concealed in a building, conveyance or an enclosed place. Therefore, Section

42 of the Act is also not applicable to the facts of the case in view of decision in **State of Haryana vs. Jarnail Singh (2004) 5 SCC 188**. Further the learned Judge should not have held that there was breach of provisions of Section 102(3) of the Code as report under Section 157 of the Code was dispatched to the learned Magistrate immediately after lodging of the complaint and that should have been regarded also as report under Section 102(3) of the Code. It is well settled that provisions of Section 102(3) of the Code are not mandatory in nature and can be substantially complied with and they were substantially complied with when report under Section 157 was forwarded to the learned Magistrate. Therefore, the finding that provisions of Section 102(3) of the Code were not complied with is hereby set aside.

13. However, there is no doubt that two samples each of 25 gms. were drawn, prepared and sealed, and were kept in separate plastic jars whereas in third plastic jar rest of the quantity of *charas* was placed. This is quite evident from the contents of the panchnama produced by the prosecution at Exh.7. The testimony of witness Mohitkumar Prachhak recorded at Exh.15 shows that at the relevant time, he was discharging duties as Police Constable at Veraval City Police Station and that PSI Mr.Agrawat had handed over one sample placed in plastic jar to him, which was to be dispatched to Forensic Science Laboratory for analysis. It is also mentioned by him that he had kept the

said *muddamal* in safe custody. Therefore, his testimony makes it very clear that two plastic jars were never handed over to him. At this stage, it would be relevant to notice the testimony of PI Mr.D.R.Buch recorded at Exh.22. This witness in his testimony has stated that after drawing two samples of 25 gms. each, the samples were placed in one plastic jar and sealed whereas PSI Mr.Agrawat has stated in his testimony that two samples drawn were placed in two separate plastic jars. The report of the Forensic Science Laboratory produced by the prosecution at Exh.34 shows that only one sealed plastic "*dibba*" containing a plastic bag in which blackish round piece and blackish dull piece, marked 1 and 2 by Forensic Science Laboratory, with total weight of 25 gms. was received by the Forensic Science Laboratory. None of the witnesses examined by the prosecution has explained as to how a plastic bag containing one blackish round piece and one blackish dull piece with total weight of 25 gms. were found in one plastic "*dibba*". It is also not explained as to how the plastic jar became a plastic "*dibba*" before it reached the Forensic Science Laboratory. From the testimony of PSI Mr.Agrawat read with the contents of panchnama produced by the prosecution at Exh.7, it is very evident that from the lump of *charas* found from the possession of the respondent, two different samples each weighing 25 gms. were drawn and placed in two separate plastic jars whereas the rest of the quantity was placed in third plastic jar. Though Mr.Agrawat says that two plastic

jars each containing 25 gms. of *charas* were handed over to Police Constable for safe custody, the Police Constable says that only one plastic jar was handed over to him. Thus, in view of sketchy and unsatisfactory evidence led by the prosecution, it is difficult to conclude that the samples drawn and prepared had, in fact, reached the Forensic Science Laboratory. If that is so, reasonable benefit of doubt which arises from the facts of the case will have to be accorded to the respondent. Thus, the acquittal of the respondent will have to be upheld not on the grounds stated by the learned Judge in the impugned judgment, but on the ground that identity of *muddamal* seized and sent to the Forensic Science Laboratory is not satisfactorily established by the prosecution.

For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the trial in the impugned judgment.

(J.M.PANCHAL, J.)

(H.B.ANTANI, J.)

Rajendra